UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE: REALPAGE, INC., RENTAL SOFTWARE ANTITRUST LITIGATION (NO. II)	**Case No. 3:23-MD-3071** **MDL No. 3071** **This Document Relates to:** **3:22-cv-01082** **3:23-cv-00357** **3:23-cv-00332** **3:23-cv-00410** **3:23-cv-00742** **Chief Judge Waverly D. Crenshaw, Jr.**

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE CLASS ACTION WAIVERS

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When Plaintiffs Brandon Watters, Jeffrey Weaver, Joshua Kabisch, Meghan Cherry, and Selena Vincin (collectively the "Subject Plaintiffs") decided to rent or continued to rent units from Defendants Lincoln Property Company ("Lincoln"), Camden Property Trust ("Camden"), Greystar Management Services, LLC ("Greystar"), and CONTI Texas Organization, Inc. d/b/a CONTI Capital ("CONTI"), they did so based on an agreement that they could not bring a class action lawsuit.[1] The class action waivers were prominently featured in the Subject Plaintiffs' leases, and they are bound by the terms, which foreclose their attempt to pursue a class action. The Court should enforce the terms of these waivers and strike the Subject Plaintiffs' class allegations.

BACKGROUND

This case involves twelve Plaintiffs' decisions to rent apartments. Second Amended Consolidated Class Action Complaint ("SAMC") ¶ 1 [Dkt. 530]. Plaintiffs allege that Defendants used RealPage's software products to raise multifamily rental prices. *Id.* ¶¶ 1−3. One of the Plaintiffs, Brandon Watters, alleges he rented a residential unit at a property called 2010 West End in Nashville, Tennessee. *Id.* ¶ 54. Plaintiff Watters alleges that Lincoln managed this property. *Id.* Plaintiff Joshua Kabisch alleges he rented a residential unit in 2022 at a property called Harlowe

[1] As noted in Dkt. 261, Dkt. 297, and Dkt. 544, several former named plaintiffs' lease agreements contained arbitration agreements, class action waivers, and jury trial waivers. Defendants have and continue to reserve their rights to enforce these provisions and intend to assert defenses based on arbitration agreements, class action waivers, and jury trial waivers as to putative class members at the appropriate time. Moreover, should Plaintiffs ever attempt to assert claims on behalf of former named plaintiffs who have since dismissed their claims (*see* Stipulation [Dkt. 554]), Defendants reserve their rights to enforce their respective arbitration agreements, class action waivers, and jury trial waivers. Defendants specifically reserve the right to enforce the jury trial waivers in any named Plaintiffs' leases. This motion reflects the information Defendants have been able to discover to date about the named Plaintiffs' agreements with Defendants. To the extent additional information is discovered relevant to the existence of arbitration agreements, class action waivers, and/or jury trial waivers for any named Plaintiffs (whether or not currently identified in the Second Amended Consolidated Class Action Complaint), Defendants reserve the right to seek enforcement of those agreements and waivers. That said, based on the information available, the Subject Plaintiffs entered into enforceable class action waivers and this motion is ripe for decision.

in Nashville, Tennessee, which he alleges was owned and managed by Greystar. *Id.* ¶ 57. Plaintiff Selena Vincin alleges she rented residential units at a property called Creekside Village Apartments, in Plano, Texas, allegedly managed by CONTI. *Id.* ¶ 59. Plaintiff Meghan Cherry alleges she rented a residential unit in Seattle, Washington at a property called the Summit at Madison Park, allegedly managed by Greystar. *Id.* ¶ 58. Plaintiff Jeffrey Weaver alleges he rented a residential unit at a property called Camden Belleview Station in Denver, Colorado, managed by Camden Property Trust. *Id.* ¶ 51.

Brandon Watters. To rent Unit 1902, Mr. Watters was sent an Apartment Lease Contract ("Watters's Lease") on August 12, 2021. *See* Exhibit 1-A to Declaration of Julie Stayton.[2] A copy of Mr. Watters's Lease as well as the audit trail is Exhibit 1-A to the Declaration of Julie Stayton ("Decl. of J. Stayton") (Exhibit 1). The audit trail shows that Lincoln's leasing agent, Harrison Young, sent the Lease to Mr. Watters on August 12, 2021, for his review and signature. *See* Watters's Lease (Exhibit 1-A) at p. 50 (audit trail); Decl. of J. Stayton (Exhibit 1) ¶ 15. Mr. Watters viewed the Lease at 17:40:45 UTC and signed 18 minutes later. Watter's Lease (Exhibit 1-A) at p. 50 (audit trail). To sign, the electronic platform required Mr. Watters to scroll through the entire agreement. Decl. of J. Stayton (Exhibit 1) ¶ 10.

Mr. Watters's Lease contained a full-page Class Action Waiver Addendum:

> You agree that you hereby waive your ability to participate either as a class representative or member of any class action claim(s) against us or our agents. While you are not waiving any right(s) to pursue claims against us related to your tenancy, you hereby agree to file any claim(s) against us in your individual capacity, and you may not be a class action plaintiff, class representative, or member in any purported class action lawsuit ("Class Action"). Accordingly, **you expressly waive**

[2] The Plaintiffs' leases are incorporated by reference in the Second Amended Consolidated Class Action Complaint and thus may properly be considered on this motion. *See Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) (holding documents central to a plaintiff's claim are considered part of the pleadings); *see also* Multifamily SAMC ¶¶ 54, 51, 57–59 (alleging Plaintiffs' rental as the basis for their claims).

> **any right and/or ability to bring, represent, join, or otherwise maintain a Class Action or similar proceeding against us or our agents in any forum.**
>
> **Any claim that all or any part of this Class Action waiver provision is unenforceable, unconscionable, void, or voidable shall be determined solely by a court of competent jurisdiction.**
>
> **YOU UNDERSTAND THAT, WITHOUT THIS WAIVER, YOU MAY HAVE POSSESSED THE ABILITY TO BE A PARTY TO A CLASS ACTION LAWSUIT. BY SIGNING THIS AGREEMENT, YOU UNDERSTAND AND CHOOSE TO WAIVE SUCH ABILITY AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY. THIS CLASS ACTION WAIVER SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THIS LEASE CONTRACT.**

Watters's Lease (Exhibit 1-A) at p. 45 (emphasis and all caps in original).

Contrary to this provision of his Lease, Plaintiff Watters filed suit in this Court asserting claims on behalf of others similarly situated in the Nashville metro area. *See* Complaint in 3:22-cv-01082 [Dkt. 1]. That case was consolidated into this MDL proceeding. On June 16, 2023, Plaintiffs filed a Consolidated Amended Complaint with Plaintiff Watters as a putative class representative. Multifamily Consolidated Amended Complaint ¶ 38 [Dkt. 291]; *see also* Multifamily FAC ¶ 38; SAMC ¶ 54.

Joshua Kabisch. On May 13, 2022, Joshua Kabisch entered into a lease contract to rent unit 1201 at 908 Division St., Nashville, Tennessee, 37203, starting on June 26, 2022 and ending on June 26, 2023. Exhibit 3-A to Declaration of Jamee Slater ("Decl. of J. Slater") ("Kabisch's Lease"). Kabisch's Lease contains a Class Action Waiver Addendum providing as follows:

> **4. CLASS ACTION WAIVER.** You agree that you hereby waive your ability to participate either as a class representative or member of any class action claim(s) against us or our agents. While you are not waiving any right(s) to pursue claims against us related to your tenancy, you hereby agree to file any claim(s) in your individual capacity, and you may not be a class action plaintiff, class representative, or member in any purported class action lawsuit ("Class Action"). Accordingly, **you expressly waive any right and/or ability to bring, represent, join, or otherwise maintain a Class Action or similar proceeding against us or our agents in any forum**.

> **Any claim that all or any part of this Class Action waiver provision is unenforceable, unconscionable, void, or voidable shall be determined solely by a court of competent jurisdiction.YOU UNDERSTAND THAT, WITHOUT THIS WAIVER, YOU MAY HAVE POSSESSED THE ABILITY TO BE A PARTY TO A CLASS ACTION LAWSUIT. BY SIGNING THIS AGREEMENT, YOU UNDERSTAND AND CHOOSE TO WAIVE SUCH ABILITY AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY. THIS CLASS ACTION WAIVER SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THIS LEASE CONTRACT.**

Kabisch's Lease (Exhibit 3-A) at p. 38 (emphasis and all caps in original). Kabisch electronically signed each page of the lease, including the page containing the class action waiver. *See, e.g.*, Kabisch's Lease (Exhibit 3-A) at p. 38 (class action waiver).

Jeffrey Weaver. The Second Amended Consolidated Class Action Complaint also names Jeffrey Weaver as a putative class representative, alleging that he rented residential properties in Denver from Defendants Bell Partners, Inc. and Camden. SAMC ¶ 51. Mr. Weaver entered into four leases for Camden's property at Camden Belleview Station beginning on March 24, 2017. *See* Declaration of Benjamin Wickert ("Decl. of B. Wickert") (Exhibit 2) ¶ 4. A copy of these leases is Exhibit 2-A to the Declaration of Benjamin Wickert. *Id.* For the three leases covering May 29, 2018 through the end of Mr. Weaver's residency at Camden's property, Paragraph 27 concludes with the statement that:

> **To the extent allowed by applicable law, Resident waives any ability or right to serve as a representative party for others similarly situated or participate in a class action suit or claim against the Owner or the Owner's managing agents. Resident acknowledges that this waiver does not, in any way, affect Resident's right to pursue any rights or remedies Resident may have against Owner as a result of Owner's default. This waiver only restricts Resident's ability to serve as a representative party or participate in a class action suit or claim against Owner or Owner's managing agents.**

Weaver's Lease (Exhibit 2-A) at p. 56 (2018 Lease), 98 (2019 Lease), 142 (2020 Lease) (emphasis in original).

Selena Vincin. Plaintiff Vincin lived at Creekside Village ("Creekside") in Plano, Texas from December 2015 to December 2020. Final Account Statement, Exhibit 4-D to Declaration of Jared Harrison ("Decl. of J. Harrison"). CONTI acquired Creekside Village in March 2018 from the previous owner. Decl. of J. Harrison ¶ 6.

Ms. Vincin signed three lease agreements while she Creekside was owned by CONTI, all for unit 1171: July 2018 – September 2019 ("2018 Lease"); September 2019 – November 2020 ("2019 Lease"); and November 2020 – December 2021 ("2020 Lease"). Decl. of J. Harrison ¶ 14; *see also* Exhibits 4-A through 4-C. Although Ms. Vincin's 2020 Lease ran through December 2021, she gave notice of her intent to move out on October 27, 2020. Decl. of J. Harrison ¶ 28. Ms. Vincin's final day at Creekside was December 26, 2020. *Id.*

All three lease agreements contain Ms. Vincin's signature as well as her initials under the following language:

> **43. Class Action Waiver.** You agree that you will not participate in any class action claims against us or our representatives. You must file any claim against us individually, and ***you expressly waive your ability to bring, represent, join or otherwise maintain a class action, collective action or similar proceeding against us in any forum.***
>
> YOU UNDERSTAND THAT, WITHOUT THIS WAIVER, YOU COULD BE A PARTY IN A CLASS ACTION LAWSUIT. ***BY SIGNING THIS LEASE, YOU ACCEPT THIS WAIVER AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY.*** THE PROVISIONS OF THIS PAR. 43 SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THIS LEASE.
>
> Resident initials: _____

Vincin 2018 Lease (Exhibit 4-A) ¶ 43; *see also* Vincin 2019 Lease (Exhibit 4-B) ¶ 43; Vincin 2020 Lease (Exhibit 4-C) ¶ 43.

Meghan Cherry. On August 5, 2018, Meghan Cherry (f.k.a. Christopher Berg) entered into a lease contract to rent the apartment at 1819 23rd Ave Seattle, Washington, 98122, starting on August 8, 2018, and ending on November 7, 2019. Exhibit 5-A to Decl. of J. Slater ("Cherry

Lease"). On November 1, 2019, Cherry renewed the lease from November 8, 2019 until August 7, 2020. Exhibit 5-B ("Cherry's Lease Renewal"). Cherry's Lease Renewal contains a Class Action Waiver Addendum providing as follows:

> **4. CLASS ACTION WAIVER.** You agree that you hereby waive your ability to participate either as a class representative or member of any class action claim(s) against us or our agents. While you are not waiving any right(s) to pursue claims against us related to your tenancy, you hereby agree to file any claim(s) against us in your individual capacity, and you may not be a class action plaintiff, class representative, or member in any purported class action lawsuit ("Class Action"). Accordingly, **you expressly waive any right and/or ability to bring, represent, join, or otherwise maintain a Class Action or similar proceeding against us or our agents in any forum.**
>
> **Any claim that all or any part of this Class Action waiver provision is unenforceable, unconscionable, void, or voidable shall be determined solely by a court of competent jurisdiction.**
>
> **YOU UNDERSTAND THAT, WITHOUT THIS WAIVER, YOU MAY HAVE POSSESSED THE ABILITY TO BE A PARTY TO A CLASS ACTION LAWSUIT. BY SIGNING THIS AGREEMENT, YOU UNDERSTAND AND CHOOSE TO WAIVE SUCH ABILITY AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY. THIS CLASS ACTION WAIVER SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THIS LEASE CONTRACT.**

Cherry's Lease Renewal (Exhibit 5-B) at p. 169 (emphasis and all caps in original).

ARGUMENT

The class action waivers bar the class allegations for the Subject Plaintiffs, which the Court should strike. In similar cases, where there is a class action waiver, courts routinely strike or dismiss class allegations, often early in the litigation. *See, e.g.*, *Camilo v. Uber Techs., Inc.*, 2018 WL 2464507, at *3 (S.D.N.Y. May 31, 2018) (striking class allegations because of class action waiver); *McIntosh v. Royal Caribbean Cruises, Ltd.*, 2018 WL 1732177, at *1, *3 (S.D. Fla. Apr. 10, 2018) (dismissing complaint because of enforceable class action waiver).[3] And this Motion is

[3] The Court has discretion to enforce the class action waivers under either Rule 12 or Rule 23(d)(1)(D). *See Niiranen v. Carrier One, Inc.*, 2022 WL 103722, at *1, *8 (N.D. Ill. Jan. 11,

of particular import—for eight Defendants,[4] the only cases remaining against them are ones that were brought by the five Subject Plaintiffs. Given that no plaintiff who can contractually pursue a class action has sued these eight Defendants, none of these eight should be subjected to expensive class wide discovery and class action procedures. Instead, they should be subject to nothing more than one or more non-class cases brought by the Subject Plaintiffs as individual renters.

A. The Subject Plaintiffs Agreed Not to Bring a Class Action Related to Their Lease Agreements.

The Subject Plaintiffs agreed to the terms of their leases, including the class action waivers therein, by signing them. *See* Watters's Lease (Exhibit 1-A) at pp. 49–50; Decl. of J. Stayton (Exhibit 1) ¶¶ 17−18; Weaver's Lease (Exhibit 2-A) at p. 61 (2018 Lease), 103 (2019 Lease), 147 (2020 Lease); Kabisch Lease (Exhibit 3-A) at p. 38; Vincin's Leases (Exhibit 4-A, 4-B, 4-C) ¶ 43 (2018 Lease), ¶ 43 (2019 Lease), ¶ 43 (2020 Lease); Cherry Lease (Exhibit 5-A) at p. 169.

Tennessee. Plaintiff Watters's and Kabisch's Leases are enforceable under Tennessee law:[5] "It is well established in Tennessee that, in order [for the terms of a contract or lease] to be

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2022) (dismissing class allegations under 12(b)(6)); *Horowitz v. AT&T Inc.*, 2019 WL 77306, at *1–2 (D.N.J. Jan. 2, 2019) (denying reconsideration of dismissal of collective action allegations); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 945, 949–50 (6th Cir. 2011) (affirming district court's ruling striking class allegations prior to discovery); *Jones v. Lubrizol Advanced Materials, Inc*., 583 F. Supp. 3d 1045, 1054 (N.D. Ohio 2022) ("Based on *Pilgrim* and its progeny, the Court agrees with Defendants that Rule 23(d)(1)(D) provides for a pre-certification motion to strike, at least in circumstances like those here and limited to purely legal questions or those resolved with little factual development."); *Bearden v. Honeywell Int'l Inc*., 2010 WL 1223936, at *9 (M.D. Tenn. Mar. 24, 2010) (explaining that "[u]nder Rules 23(c)(1)(A) and 23(d)(1)(D), as well as pursuant to Rule 12(f), this Court has authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained").

[4] The eight Defendants are Allied Orion Group, LLC, Brookfield Properties Multifamily LLC, CONTI Capital, Kairoi Management, LLC, Knightvest Residential, Rose Associates Inc., Sherman Associates Inc., and Thrive Communities Management, LLC.

[5] Tennessee law applies to Plaintiff Watters and Kabisch's Leases as they executed contracts for residential units in Tennessee. *See Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624, 632 (Tenn. Ct. App. 2017).

enforceable, a contract must represent mutual assent to its terms, be supported by sufficient consideration, be free from fraud and undue influence, be sufficiently definite, and must not be contrary to public policy." *Howard-Hill v. Spence*, 2017 WL 4544599, at *7 (E.D. Tenn. Oct. 11, 2017) (quoting *T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 865–66 (Tenn. Ct. App. 2002)).[6] Under Tennessee law, "[i]t is a bedrock principle of contract law that an individual who signs a contract is presumed to have read the contract and is bound by its contents." *84 Lumber Co. v. Smith*, 356 S.W.3d 380, 383 (Tenn. 2011). Despite Plaintiffs' attempts to muddy the waters with allegations regarding the NAA's lease (SAMC ¶¶ 320–324, 329–331), under Tennessee law, whether a contract is a form or standard contract is not determinative of its enforceability. *Depositors Ins. Co. v. Est. of Ryan*, 212 F. Supp. 3d 728, 735 (W.D. Tenn. 2015) (explaining "[t]hat a contract is a contract of adhesion 'is not . . . determinative of the contract's enforceability'"); *Elmore v. One West Bank, FSB*, 2012 WL 6156035, at *4 (W.D. Tenn. Dec. 11, 2012) ("A contract of adhesion is enforceable unless the contract is found to be unconscionable."). And because Mr. Watters and Mr. Kabisch made payments under their Leases, they are estopped from denying they are bound. *See T.R. Mills Contractors, Inc.*, 93 S.W.3d at 866 (explaining that when a party to a contract "manifested consent by performing under it and making payments conforming to its terms, that party is estopped from denying that the parties had a meeting of the minds sufficient to bind them to the contract"). Plaintiff Watters acknowledges that he lived at 2010 West End and paid rent. SAMC ¶ 54. As does Plaintiff Kabisch at the Harlowe. *Id.* ¶ 57.

[6] While Plaintiff Watters "did not sign the page of the lease that contains the class action waiver," (SAMC ¶ 330), he nevertheless is bound by the entire lease as he signed at the end and lived in the unit and paid rent according to its terms. Tennessee law does not require the Lease be signed. "A written contract does not have to signed to be binding on the parties." *Howard-Hill*, 2017 WL 4544599, at *7; *see also McCray v. Universal Health Servs.*, 2020 WL 4207648, at *6 (M.D. Tenn. July 22, 2020) ("[U]nder Tennessee law . . . a party's intent to be bound by a written contract need not necessarily be manifested by a signature.").

Accordingly, Plaintiffs Watters and Kabisch are bound under the lease for those units, and their class action waiver.

Colorado. Plaintiff Weaver's Lease is equally enforceable under Colorado law.[7] Under Colorado law, for a contract's terms to be enforceable "requires mutual assent to an exchange, between competent parties, with regard to a certain subject matter, for legal consideration." *Indus. Prods. Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983, 988 (Colo. App. 1998); *see also Farmer v. Banco Popular of N. Am.*, 2013 WL 2112428, at *5 (D. Colo. May 15, 2013) (same). Colorado courts "have repeatedly held that one who signs or accepts a written contract, in the absence of fraud, is conclusively presumed to know its contents and to assent to them." *Bell v. Land Title Guarantee Co.*, 422 P.3d 613, 616 (Colo. App. 2018). Plaintiff Weaver signed his lease for Camden Belleview Station, and he acknowledges that he lived there and paid rent. SAMC ¶ 51. Accordingly, Plaintiff Weaver is bound under the lease for that unit, and its class action waiver.

Texas. Vincin's Lease is likewise enforceable under Texas law.[8] Under Texas law, contracts are enforceable where there is "(1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with intent that it be mutual and binding." *In re Capco Energy, Inc.*, 669 F.3d 274, 279–80 (5th Cir. 2012). It is "presume[d] that 'a party who signs a contract knows its contents.'" *In re Bank One, N.A.*, 216 S.W.3d 825, 826 (Tex. 2007). Plaintiff Vincin signed her lease for Creekside Village and she acknowledges she lived there and paid rent

[7] *See, e.g.*, Weaver's Lease (Exhibit 2-A) p. 59, ¶ 38 (applicable law is state in which the unit is located).

[8] *See, e.g.*, Vincin's Leases (Exhibit 4-A, 4-B, 4-C) ¶ 6 (2018 Lease), ¶ 6 (2019 Lease), ¶ 6 (2020 Lease).

according to the terms of the agreement, which contains a class action waiver, and she is bound by its terms. *See* SAMC ¶ 59.

Washington. Cherry's Lease Renewal is enforceable under Washington law.[9] Under Washington law, "[t]here must have been mutual assent and understanding, or a meeting of the minds of the parties, arrived at by a clear and explicit acceptance of a proper and unrevoked offer, and unaffected by fraud, duress, undue influence, or mistake." *Lager v. Bergen*, 60 P.2d 99, 101 (Wash. 1936); *see also Seiler v. Black*, 2009 WL 4349306, at *2 (Wash. Ct. App. Dec. 3, 2009); *see also Trotzer v. Vig*, 203 P.3d 1056, 1061 (Wash. Ct. App. 2009) (reciting contracts). "One who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party." *Tjart v. Smith Barney, Inc.*, 28 P.3d 823, 829 (Wash. Ct. App. 2001). Plaintiff Cherry acknowledges that she lived at the Summit at Madison Park and paid rent. *See* SAMC ¶ 58. Accordingly, Plaintiff Cherry is bound under the lease she signed for that apartment, including its class action waiver.

B. The Court Should Enforce the Class Action Waivers.

The class action waivers are clear and straightforward. Plaintiff Watters, Kabisch, and Cherry all agreed to "waive [their] ability to participate either as a class representative or member of any class action claim(s) against us or our agents." Watters's Lease (Exhibit 1-A) at p. 45; Kabisch Lease (Exhibit 3-A) at p. 38, Cherry Lease Renewal (Exhibit 5-B) at p. 169. They also "**expressly waive[d] any right and/or ability to bring, represent, join, or otherwise maintain a Class Action or similar proceeding against us or our agents in any forum.**" *Id.* (emphases in originals). Mr. Weaver agreed to "**waive[] any ability or right to serve as a representative party**

[9] Washington law applies to Cherry's Lease Renewal as Washington is "the place of contracting, the place of negotiating the contract and the place of performance . . . ." *See Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wash. 2d 893, 899, 901 (Wash. 1967).

for others similarly situated or participate in a class action suit or claim against the Owner or the Owner's managing agents." Weaver's Lease (Exhibit 2-A) p. 56 (2018 Lease), 98 (2019 Lease), 142 (2020 Lease) (emphasis in original). Ms. Vincin agreed that "WITHOUT THIS WAIVER, YOU COULD BE A PARTY IN A CLASS ACTION LAWSUIT. ***BY SIGNING THIS LEASE. YOU ACCEPT THIS WAIVER AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY***. THE PROVISIONS OF THIS PAR. 43 SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THIS LEASE." Vincin's Lease (Exhibit 4-A) ¶ 43 (2018 Lease), ¶ 43 (2019 Lease), ¶ 43 (2020 Lease) (emphasis in original). "A class or collective action waiver is a promise to forgo certain procedural mechanisms in court." *Cohen v. UBS Fin. Servs., Inc*., 799 F.3d 174, 179 (2d Cir. 2015). These types of waivers are enforceable, *see Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 231, 239 (2013), with courts across the country enforcing them. *See, e.g.*, *Korea Week, Inc. v. Got Cap., LLC*, 2016 WL 3049490, at *9–10 (E.D. Pa. May 27, 2016).

The rationale for enforcement is straightforward: "class action waivers are upheld because they are contractual provisions that do not affect any substantive rights." *Palmer v. Convergys Corp.*, 2012 WL 425256, at *2 (M.D. Ga. Feb. 9, 2012). As the Supreme Court has held, Rule 23 did not "establish an entitlement to class proceedings for the vindication of statutory rights." *Italian Colors*, 570 U.S. at 234. Class action waivers merely limit litigation "to the two contracting parties." *See id.* at 236. "It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief[.]" *Id.*

In other words, class actions are simply "a litigation device," and "waivers are proper tools to be used by parties in contracting and bargaining." *Palmer*, 2012 WL 45256, at *3; *see also Bonanno v. Quizno's Franchise Co.*, 2009 WL 1068744, at *11 (D. Colo. Apr. 20, 2009) ("Federal

Rule 23 clearly remains a procedural tool, not a substantive or jurisdictional right."); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005) (upholding class action waiver); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 488 (2d Cir. 2013) (enforcing class action waiver). Thus, courts regularly enforce class action waivers, whether attached to an arbitration agreement,[10] or not.[11]

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[10] *Williams v. Dearborn Motors 1, LLC*, 2021 WL 3854805, at *2–6 (6th Cir. Aug. 30, 2021) (affirming dismissal of Plaintiffs' class action discrimination lawsuit and upholding the class action waiver policy in a mandatory employment arbitration agreement); *Sharp v. Terminix Int'l, Inc.*, 2018 WL 3520140, at *8 (W.D. Tenn. July 20, 2018) ("The class action waiver is enforceable."); *Duke v. Luxottica U.S. Holdings Corp.*, 2023 WL 6385389, at *10 (E.D.N.Y. Sept. 30, 2023) (enforcing class action waiver); *Coleman v. Optum Inc.*, 2023 WL 6390665, *5–8 (S.D.N.Y. Sept. 29, 2023) (same); *Laver v. Credit Suisse Sec. (USA), LLC*, 976 F.3d 841, 846–49 (9th Cir. 2020) (enforcing class action waiver in FINRA case); *Archer v. Carnival Corp. & PLC*, 2020 WL 6260003, at *7 (C.D. Cal. Oct. 20, 2020) (enforcing class action waiver); *Blevins v. Teletech Holdings, Inc.*, 2019 WL 3291575, at *6 (W.D. Mo. July 22, 2019) (same); *UBS Fin. Servs., Inc.*, 799 F.3d at 179–80 (enforcing "class or collective action waiver" and distinguishing it from arbitration context); *Camilo*, 2018 WL 2464507, at *3 (enforcing class action waiver and striking class allegations); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234–36 (11th Cir. 2012) (enforcing class action waiver and arbitration clause); *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 770–72 (N.D. Ohio 2009) (upholding class action waiver);.

[11] *Niiranen*, 2022 WL 103722, at *7–9 (enforcing class-action waiver without arbitration provision); *Flores-Mendez v. Zoosk, Inc.*, 2022 WL 2967237, at *2 (N.D. Cal. July 27, 2022) (same); *Barnett v. Concentrix Sols. Corp.*, 2022 WL 17486813, at *5–6 (D. Ariz. Dec. 7, 2022), *appeal dismissed*, 2023 WL 2596688 (9th Cir. Jan. 31, 2023) (same); *Román v. Spirit Airlines, Inc.*, 482 F. Supp. 3d 1304, 1315 (S.D. Fla. 2020), *aff'd*, 2021 WL 4317318 (11th Cir. Oct. 1, 2020) (same); *Hancock v. Jackson Hewitt Tax Serv., Inc.*, 2020 WL 2487562, at *3 (W.D. Tex. May 14, 2020), *report and recommendation adopted*, 2020 WL 10054530 (W.D. Tex. June 8, 2020) (same); *Horowitz*, 2019 WL 77306, at *3–4 (same); *McIntosh*, 2018 WL 1732177, at *3 (same); *DeLuca v. Royal Caribbean Cruises, Ltd.*, 244 F. Supp. 3d 1342, 1348–49 (S.D. Fla. 2017) (same); *Convergys Corp. v. NLRB*, 866 F.3d 635, 638 (5th Cir. 2017) (class-action waiver "must be enforced according to its terms" and is not limited to arbitration); *Delaney v. FTS Int'l Servs., LLC*, 2017 WL 264463, at *7–9 (M.D. Pa. Jan. 20, 2017) (enforcing class action waiver without arbitration provision); *Feamster v. Compucom Sys., Inc.*, 2016 WL 722190, at *3–4 (W.D. Va. Feb. 19, 2016) (same); *Serrano v. Globe Energy Serv., LLC*, 2016 WL 7616716, at *5 (W.D. Tex. Mar. 3, 2016) (same); *Mark v. Gawker Media LLC*, 2016 WL 1271064, at *6 (S.D.N.Y. Mar. 29, 2016) (same); *Benedict v. Hewlett-Packard Co.*, 2016 WL 1213985, at *5–6 (N.D. Cal. Mar. 29,

Plaintiffs will point to *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 590–92 (6th Cir. 2014), where the court held that a plaintiff could not waive its right to participate in a collective action in Fair Labor Standards Act ("FLSA") cases without an arbitration provision. But the Sixth Circuit has already expressed doubt as to whether that decision survived the Supreme Court's ruling in *Epic Sys. Corp. v. Lewis*, —— U.S. ——, 138 S. Ct. 1612, 1632 (2018). *See Gaffers v. Kelly Servs., Inc*., 900 F.3d 293, 297 (6th Cir. 2018) (explaining that "*[e]ven if* [plaintiff] is correct about the holdings of those cases," including *Killion*, "*Epic* clearly overrules them because they would 'target arbitration'") (emphasis in original).

Regardless, the *Killion* decision does not apply here because this case involves an antitrust claim, a federal statute that does not include a preference for collective action.[12] In *Killion*, the court relied on language in the FLSA that specifically allowed collective actions. 761 F.3d at 590–92 (explaining that Congress provided that FLSA plaintiffs "should have the opportunity to proceed collectively" and that collective proceedings are "the policy articulated in the FLSA"). But as the Supreme Court has noted, the Sherman Act has no such provision: "[n]o contrary congressional command requires us to reject the waiver of class arbitration here . . . . [T]he antitrust

2016) (same); *Korea Week*, 2016 WL 3049490, at *9 ("We turn, then, to whether a class action waiver independent and outside of an arbitration agreement is unenforceable. We find the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant* supports our conclusion class action waivers outside of arbitration are enforceable."); *Mazurkiewicz v. Clayton Homes, Inc*., 971 F. Supp. 2d 682, 691–92 (S.D. Tex. 2013) (enforcing class action waiver without arbitration provision); *Kubischta v. Schlumberger Tech Corp*, 2016 WL 3752917, at *6–8 (W.D. Pa. July 14, 2016) (same); *Birdsong v. AT & T Corp*., 2013 WL 1120783, at *6 (N.D. Cal. Mar. 18, 2013); *Palmer*, 2012 WL 425256, at *2–6 (same); *Lu v. AT & T Servs., Inc.*, 2011 WL 2470268, at *3 (N.D. Cal. June 21, 2011) (same); *Copello v. Boehringer Ingelheim Pharms. Inc.*, 812 F. Supp. 2d 886, 897 (N.D. Ill. 2011) (same); *Bonanno*, 2009 WL 1068744, at *12, *24 (same).

[12] Accordingly, the result is the same whether analyzed under Fifth Circuit, Sixth Circuit, Ninth Circuit, or Tenth Circuit case law. *See, e.g.*, *Convergys*, 866 F.3d at 638; *Carter v. Rent-A-Ctr., Inc.*, 718 F. App'x 502, 504 (9th Cir. 2017); *Bonanno*, 2009 WL 1068744, at *12, *24 (enforcing class action waiver).

laws do not guarantee an affordable procedural path to the vindication of every claim." *Italian Colors*, 570 U.S. at 233. As the Court explained, "[t]he antitrust laws do not 'evince an intention to preclude a waiver' of class-action procedure" and "[t]he Sherman and Clayton Acts make no mention of class actions." *Id.* at 228–29, 234 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *see also Williams v. Dearborn Motors 1, LLC*, 2021 WL 3854805, at *3 (6th Cir. Aug. 30, 2021) ("In *Italian Colors*, the Court upheld a class action waiver policy as enforceable in the context of an antitrust action, observing that there was '[n]o contrary congressional command' requiring the Court to reject the class waiver.). In other words, even if *Killion* remains good law, this case does not involve an FLSA claim or any federal policy favoring collective action.[13]

Because class action waivers are enforceable as a matter of law,[14] the Court should enforce the class action waivers signed by the Subject Plaintiffs and strike their class allegations.

[13] *See also Gaffers*, 900 F.3d at 297 (describing *Killion* as "this circuit's FLSA precedent" and not applying it to an NLRB case).

[14] All Defendants are entitled to enforce the class action waivers in the Subject Plaintiffs' leases under equitable estoppel principles. *See Green v. Mission Health Cmtys., LLC*, 2020 WL 6702866, at *9 (M.D. Tenn. Nov. 13, 2020) (holding that the plaintiff was "estopped from avoiding arbitration" when plaintiff alleged that defendants "jointly engaged in the alleged wrongdoing"); *Naranjo v. Nick's Mgmt., Inc.*, 2023 WL 416313, at *10–11 (N.D. Tex. Jan. 25, 2023) (holding non-signatory may enforce class action waiver under equitable estoppel principles); *Santich v. VCG Holding Corp.*, 443 P.3d 62, 65 (Colo. 2019) (recognizing nonsignatories to a contract may be able to enforce its terms in certain circumstances); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (recognizing that "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel'" and that such principles apply to arbitration agreements); *Ordosgoitti v. Werner Enters., Inc.*, 2022 WL 874600, at *8–10 (D. Neb. Mar. 24, 2022) (same); *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 851 (D. Md. 2013) (same). At this time, however, only Camden seeks to enforce the class action waiver in Weaver's Lease. All other Defendants specifically reserve the right to enforce Mr. Weaver's class action waiver.

C. The Class Action Waivers are Not Unconscionable.

None of the Subject Plaintiffs can avoid the class action waiver on unconscionability grounds either. The "vast majority of state and federal courts" have found that class action waivers are not per se unconscionable. *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 714 (Tenn. Ct. App. 2006). Thus, the Court should enforce them as written. However even if the Court were to examine the waivers for unconscionability, unconscionability depends on the "facts and circumstances of a particular case," *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 750 (Tenn. 2015), and here none of the Subject Plaintiffs can show unconscionability.

Plaintiff Watters & Kabsich. To evade their class action waivers, Mr. Watters and Mr. Kabisch would have to establish both procedural and substantive unconscionability. *See, e.g.*, *Rubio v. Carreca Enters., Inc.*, 490 F. Supp. 3d 1277, 1289 (M.D. Tenn. 2020) ("It is not enough for the moving party to establish procedural or substantive unconscionability alone. Both must be established."). Tennessee courts only find unconscionability "when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other." *Anderson v. Amazon.com, Inc.*, 478 F. Supp. 3d 683, 696 (M.D. Tenn. 2020).

Mr. Watters and Mr. Kabisch cannot prove procedural or substantive unconscionability. "Procedural unconscionability is usually some impropriety during the process of forming the contract that deprives a party of a meaningful choice." *Byrd v. SunTrust Bank*, 2013 WL 3816714, at *7 (W.D. Tenn. July 22, 2013). No such impropriety occurred here. In fact, Mr. Watters took 18 minutes to review the Lease and had the opportunity to scroll through the Lease before signing. *See Iysheh v. Cellular Sales of Tenn., LLC*, 2018 WL 2207122, at *2, *6 (E.D. Tenn. May 14, 2018) (enforcing arbitration agreement when the party reviewed the online form "by scrolling to

the bottom of each document" and "electronically sign[ing] the document"); Decl. of J. Stayton (Exhibit 1) ¶ 10. Mr. Kabisch signed each page of his Lease, including the Class Action Waiver Addendum. Kabisch's Lease (Exhibit 3-A) at p. 38.

Tennessee Courts have held that provisions that are clearly labeled and contain bold and capitalized lettering, sufficient to put Plaintiffs on notice as to the unavailability of class action relief *should not* be considered unconscionable. *See e.g.*, *Chapman v. H & R Block Mortg. Corp.*, 2005 WL 3159774, at *4 (Tenn. Ct. App. Nov. 28, 2005) (enforcing arbitration agreement because it was neither inconspicuous nor unconscionable when it was added to the contract as a *stand-alone, two-page* document clearly labeled with the heading "AGREEMENT FOR THE ARBITRATION OF DISPUTES")); *see also Emerson v. Wyndham Vacation Resorts, Inc.*, 2022 WL 1652307, at *2–3 (M.D. Tenn. May 24, 2022) (enforcing arbitration agreement that was "featured prominently," had a conspicuous bold heading, and contained "bold and capital lettering"); *Byrd*, 2013 WL 3816714, at *8–9 (finding an agreement conspicuous, and not unconscionable, where the heading used "bold, all-capital letters"). Here, the class waiver was in prominent and conspicuous language on a separate page, with a heading in bold, all-capital lettering: "**CLASS ACTION WAIVER ADDENDUM**." *See* Watters's Lease (Exhibit 1-A) at p. 45; Kabisch's Lease (Exhibit 3-A) at p. 38. The terms explain the scope of the waiver, and again use bold and all-capital lettering to emphasize that Mr. Watters and Mr. Kabisch were "**CHOOS[ING] TO WAIVE SUCH ABILITY AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY.**" *See* Watters's Lease (Exhibit 1-A) at p. 45 (emphasis in original); Kabisch's Lease (Exhibit 3-A) at p. 38 (emphasis in original). It continues to state: "**BY SIGNING THIS AGREEMENT, YOU UNDERSTAND AND CHOOSE TO WAIVE SUCH ABILITY AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIVIDUALLY**." *Id.*

Nor is the waiver substantively unconscionable. Substantive unconscionability may arise from "unreasonably harsh" contract terms. *Amazon.com, Inc.*, 478 F. Supp. 3d at 696. The class waiver here contains no unreasonably harsh terms. It simply limits Mr. Watters and Mr. Kabisch's procedural rights to pursue claims on behalf of others, while "not waiving any right(s) to pursue claims against us related to [his] tenancy" in an "individual capacity." *See* Watters's Lease (Exhibit 1-A) at 45; Kabisch's Lease (Exhibit 3-A) at p. 38; *see also, e.g.*, *Peacock v. First Order Pizza, LLC*, 2022 WL 17475791, at *6–7 (W.D. Tenn. Dec. 6, 2022) (rejecting argument that waiver of appellate review and class/collective litigation was substantively unconscionable and stating it did not even "present[] a close call"); *Sharp*, 2018 WL 3520140, at *6 (finding arbitration agreement with a class action waiver not substantively unconscionable); *Winn v. Tenet Healthcare Corp.*, 2011 WL 294407, at *8 n.6 (W.D. Tenn. Jan. 27, 2011) ("Even under Tennessee law, an arbitration provision is not unconscionable merely because it waives an employee's right to bring a collective action[.]").

Plaintiff Weaver. Colorado law is clear: "[w]e will enforce the agreement as written unless there is an ambiguity in the language; courts should neither rewrite the agreement nor limit its effect by a strained construction." *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003). Against this backdrop, "[a]s the part[y] seeking to escape application of an unambiguous contractual provision, the burden rests on [Mr. Weaver] to show that the Court should not enforce the class action bar provision." *Bonanno*, 2009 WL 1068744, at *12 (enforcing class action waiver). "In Colorado, for a contract to be unconscionable, it must be both substantively and procedurally unconscionable." *Vernon v. Qwest Commc'ns Int'l, Inc.*, 925 F. Supp. 2d 1185, 1194 (D. Colo. 2013) (citing *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986)). Colorado law considers several factors in determining whether a contractual provision is unconscionable. *Bernal v. Burnett*, 793 F. Supp. 2d

1280, 1286 (D. Colo. 2011) (listing factors). Under this framework, Mr. Weaver cannot show either procedural or substantive unconscionability. Mr. Weaver's class waiver was in prominent and conspicuous language, in bold and underlined to call Mr. Weaver's attention to it. *See* Weaver's Lease (Exhibit 2-A) at p. 56 (2018 Lease), 98 (2019 Lease), 142 (2020 Lease) (emphasis in original). Mr. Weaver's class action waiver does not contain unreasonably harsh terms. It simply limits Mr. Weaver's procedural rights to pursue claims on behalf of others, while not "affect[ing] [Mr. Weaver's] right to pursue any rights or remedies [he] may have," it "only restricts [Mr. Weaver's] ability to serve as a representative party or participate in a class action suit." *Id.*; *see also Blevins*, 2019 WL 3291575, at *5–6 (explaining class action waiver does not render contract substantively unconscionable under Colorado law); *Bonanno*, 2009 WL 1068744, at *23 (explaining Rule 23 is a procedural mechanism, not a substantive right). Mr. Weaver was given the opportunity to review and sign his lease, and as a result, he is bound by the terms therein.

Plaintiff Vincin. Texas law likewise enforces contracts as written. *See Warren v. Chesapeake Expl., L.L.C.*, 759 F.3d 413, 415 (5th Cir. 2014). To avoid enforcement of the contract, Ms. Vincin must show procedural or substantive unconscionability. *Rathmann v. Ford Motor Co.*, 2023 WL 6150270, *3–4 (W.D. Tex. Aug. 25, 2023), *report and recommendation adopted*, 2023 WL 6150787 (W.D. Tex. Sept. 20, 2023) (holding class action waiver not procedurally or substantively unconscionable under Texas law). Ms. Vincin can show neither. The class action waiver is not procedurally unconscionable. *See id.* at *4 ("Procedural unconscionability refers to the circumstances surrounding adoption of a contractual provision."). Ms. Vincin's class waiver was in prominent and conspicuous language directly above her signature panel, with a heading in bold, and in all-capital lettering that was underlined to draw Ms. Vincin's attention. Vincin 2018 Lease (Exhibit 4-A) ¶ 43. The waiver itself explains the terms of the waiver and that it survives

termination of the lease. *Id.* This is a far cry from what the law in Texas considers procedurally unconscionable. *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002) (explaining "[t]he only cases under Texas law in which an agreement was found procedurally unconscionable involve situations in which one of the parties appears to have been incapable of understanding the agreement").

Nor is the class action waiver substantively unconscionable. A "contract or clause is substantively unconscionable 'where its inequity shocks the conscience.'" *Rathmann*, 2023 WL 6150270, at * 3 (quoting *Muzquiz v. Para Todos, Inc.*, 624 S.W.3d 263, 276 (Tex. App. 2021)). Because class action litigation is a procedural device and does not affect a plaintiff's substantive rights, waiving the ability to proceed in a class does not shock the conscience. *See id.* (noting that "class action litigation has only limited public policy favoring it").

Plaintiff Cherry. The Ninth Circuit has "foreclos[ed] any argument that a class action waiver, by itself, is unconscionable under state law or that an arbitration agreement is unconscionable solely because it contains a class action waiver." *Carter v. Rent-A-Ctr., Inc.*, 718 F. App'x 502, 504 (9th Cir. 2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). Cherry cannot circumvent the terms of her lease, including the class action waiver. Rather, "[i]t is black letter law of contracts law that the parties to a contract shall be bound by its terms." *Adler v. Fred Lind Manor*, 103 P.3d 773, 781 (Wash. 2004) (citing *Nat'l Bank of Wash. v. Equity Invs., L.P.*, 506 P.2d 20 (Wash. 1973)). Thus, this Court should enforce the class action waiver in Cherry's Lease Renewal without analyzing any enforceability issues.

Even if the Court elects to analyze enforceability, however, the class action waiver in Cherry's Lease Renewal should be enforced because it is not substantively or procedurally unconscionable. "Substantive unconscionability involves those cases where a clause or term in the

contract is alleged to be one-sided or overly harsh." *Id.* "'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." *Id*. (quoting *Nelson v. McGoldrick*, 896 P.2d 1258, 1262 (Wash. 1995)). "Procedural unconscionability," by contrast, "is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including '[t]he manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print.'" *Id.* (quoting *Nelson*, 896 P.2d at 1262)).

The class action waiver in Cherry's Lease Renewal is not substantively unconscionable. A class action waiver is merely "a promise to forgo a procedural right to pursue class claims." *Lindsay v. Carnival Corp.*, 2021 WL 2682566, at *4 (W.D. Wash. Jun. 30, 2021 (citing *Laver v. Credit Suisse Sec. (USA), LLC*, 976 F.3d 841, 846 (9th Cir. 2020)). Further, "the Supreme Court, in upholding a class action waiver in an arbitration agreement, rejected the notion that Rule 23 established an entitlement to class proceedings." *Id*. (citing *Italian Colors*, 570 U.S. at 234). Because a class action waiver only requires a plaintiff to forgo a procedural right—a right to which the plaintiff has no entitlement—a class action waiver does not shock the conscience, is far from being monstrously harsh, and can hardly be characterized as exceedingly callous against Cherry. *See Romney v. Franciscan Med. Grp.*, 349 P.3d 32, 38 (Wash. Ct. App. 2015) (holding arbitration agreements "are not so one-sided as to be labeled substantively unconscionable").

Similarly, the class action waiver is not procedurally unconscionable. Cherry did not lack meaningful choice because, among other reasons, she could have chosen to live in another place. *See id.* (holding that employee had meaningful choice because they could choose employment elsewhere). Further, the class action waiver occupied a full page of Cherry's Lease Renewal and

included a specific heading in capital letters and bold typeface stating **CLASS ACTION WAIVER ADDENDUM.** *See* Cherry's Lease Renewal (Exhibit 5-A) at p. 169. The class action waiver was not buried in fine print. *See Romney*, 349 P.3d at 37 (holding arbitration clause not procedurally unconscionable where it "was not buried in fine print."); *see also Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 761 (Wash. 2004) (holding arbitration agreement not hidden in a "maze of fine print" because "the agreement was clearly labeled **'ARBITRATION AGREEMENT,'** underlined, bolded, and in capital letters").

Moreover, while it is true that the Supreme Court of Washington has held that class actions waivers in arbitration agreements are unconscionable in some circumstances, *see e.g.*, *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007), that holding did not establish a general rule and the rationale and facts underlying those holdings are both inconsistent with *Italian Colors* and distinguishable from this case.

CONCLUSION

For these reasons, Defendants ask the Court to enforce the terms of Plaintiff Brandon Watters, Joshua Kabisch, Jeffrey Weaver, Selena Vincin, and Meghan Cherry's leases and the class action waivers therein and strike their class allegations.

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I hereby certify that on October 9, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 9th day of October, 2023.

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